

1 **BEFORE THE DEPARTMENT OF**
2 **NATURAL RESOURCES AND CONSERVATION**
3 **OF THE STATE OF MONTANA**

4 * * * * *

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT 41S 30005803 BY WILLIAM &)
WENDY LEININGER)

FINAL ORDER

5 * * * * *

6 Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont. Code Ann.), to the
7 contested case provisions of the Montana Administrative Procedure Act (Title 2, Chapter 4,
8 Mont. Code Ann.) and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held
9 on August 11, 2005 in Stanford, Montana before Hearing Examiner Charles F. Brasen to
10 determine whether the issuance of a beneficial water use permit to William & Wendy Leininger
11 (hereinafter "Applicant") would be consistent with the requirements of Mont. Code Ann. § 85-2-
12 311. At the hearing, Larry Jennings (not "Jenkins" as stated in the Proposal For Decision)
13 provided testimony in support of Objector Thomson. Mr. Jennings was called due to his
14 experience as a well driller. The Applicant's expert, Joel Adams, provided expert testimony
15 regarding hydrogeology. At the conclusion of the hearing the Hearings Examiner requested
16 briefs from the parties regarding "reasonable exercise" under Mont. Code Ann. § 85-2-401(1).
17 Timely briefs were filed by Counsel for Applicant Leininger and Objectors Gilkey Farms and
18 Victor Thomson.

19 As a result of that hearing, a Proposal for Decision was entered on January 6, 2006. The
20 Proposal for Decision recommended issuance of the application, with conditions and limitations.

21 Objector Gilkey Farms, represented by W. John Teitz, filed timely exceptions to the
22 Proposal For Decision and a supporting brief on January 26, 2006. Objector Gilkey Farms
23 excepted to Finding of Fact 14, Department Exhibit No.1, and Proposed Order Condition D.

24 Objector Victor Thomson, represented by James A. Hubble, filed timely exceptions to the
25 Proposal For Decision, a supporting brief, and a request for oral argument on January 26, 2006.
26 Objector Victor Thomson excepted to Findings of Fact 11, 12, 14, &16; Conclusions of Law 5 &
27 6; Proposed Order Conditions A, C, D, & E; and to the procedure, specifically, allowing use of
28 additional evidence produced by the Staff Expert after the record was closed.

1 Applicant, represented by John E. Bloomquist, filed timely exceptions to the Proposal for
2 Decision on January 26, 2006, requesting that the monitoring requirement contained in the
3 Proposed Order (Proposed Order Condition D) be modified. Applicant did not request oral
4 argument on the proposed modification unless other exceptions were lodged.

5
6 Oral argument was held in Helena, Montana, on June 21, 2006 before Hearing Examiner
7 William J. Schultz. Mr. Bloomquist, Mr. Teitz, and Mr. Hubble appeared. Applicant William
8 and Wendy Leininger attended but did not testify.

9 **STANDARD OF REVIEW**

10
11 The standard of review for a Proposal for Decisions is established by Mont. Code Ann.
12 §2-4-621(3) as follows:

13 The agency may adopt the proposal for decision as the agency's final order. The
14 agency in its final order may reject or modify the conclusions of law and
15 interpretation of administrative rules in the proposal for decision but may not
16 reject or modify the findings of fact unless the agency first determines from a
17 review of the complete record and states with particularity in the order that the
18 findings of fact were not based upon competent substantial evidence or that the
19 proceedings on which the findings were based did not comply with essential
20 requirements of law.

21
22 "Substantial evidence" is "evidence that a reasonable mind might accept as adequate to support a
23 conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a
24 preponderance." *Swain v. Battershell*, 1999 MT 101, ¶ 34, 294 Mont. 282, ¶ 34, 983 P.2d 873, ¶
25 34.

26 **EXCEPTIONS**

27 **Objector Gilkey Farms' Exceptions**

28 Objector Gilkey Farms argues that the Hearing Examiner's Proposal for Decision was in error
29 because the Hearing Examiner:

- 30 1) Abused his discretion by basing the Finding of Fact No. 14 on evidence produced
31 by the Staff Expert (Department Exhibit No.1) after the hearing record was
32 closed. Reliance on the post-hearing evidence produced by the Staff Expert
33 violates constitutional due process as well as the Montana Administrative

Procedures Act (MCA § 2-4-101, et. seq.) and DNRC's Procedural Rules for Water Right Contested Case Hearings (ARM 36.12.201 et. seq.).

- 2) Used Department Exhibit No. 1, the Staff Expert analysis, which is not supported by substantial evidence, to arrive at Proposal For Decision. Evidence in the record does not demonstrate any correlation in drawdown between Gilkey Farms' well and the Applicants' well.
- 3) Required compliance with Proposed Order Condition D, which is vague and ambiguous in that it does not specify the method for measuring progressive drawdown nor does it specify the duration of time the Applicant must stop pumping if the progressive drawdown exceeds 15 feet per year.

Objector Victor Thomson's Exceptions

Objector Victor Thomson argues that the Hearing Examiner's Proposal for Decision was in error because:

- 4) Finding of Fact No. 11 did not identify which well was shut in and speculated on the amount of drawdown.
- 5) Finding of Fact No. 12 does not support that there would be approximately 80 years of water for nearby appropriators nor that the Gilkey well has 400 feet of head above ground level and 800 feet of head below ground level for a total of approximately 1200 feet of available draw down.
- 6) Finding of Fact No. 14 ignores that the Gilkey well will experience a 61 foot drawdown at the end of the 240 day irrigation season and substitutes "a possible fifteen (15) feet per year rate of progressive draw down if full pressure recovery does not occur."; does not provide credible support for the finding of no adverse effect based on speculation regarding the Swift aquifer; does not provide credible support that the magnitude of effects would decrease as distance increases; incorrectly finds that there is a preponderance of evidence that there is no adverse effect on prior appropriators; fails to mention evidence in the record of a dramatic decrease in pressure in Thomson's well.
- 7) Finding of Fact No. 16 is incorrect in that it seems to say prior appropriators should bear any expense they incur caused by the applicants use of water; the

finding of “approximately eighty (80) years of water for nearby appropriators to exercise their prior rights” are speculative and not supported by the record.

8) Conclusion of Law No. 5 that water is legally available is not supported by sufficient credible evidence.

9) Conclusion of Law No. 6 that granting the permit with conditions will not adversely affect water rights of prior appropriators is not supported by sufficient credible evidence; the conclusion that “Objectors will have water available for their use without a pump for years to come” is not supported by the record.

10) The permit should allow no irrigation; should require the Applicant to provide Objectors with records sent to Lewistown Water Resources Regional Office; allow monitoring by the Objectors; should require monitoring by DNRC and the Objectors; should require inspection and approval by the DNRC and the Objectors.

Applicant’s Exceptions

11) Applicant seeks clarification and modification to the condition regarding progressive or residual drawdown (Condition D) that the Hearing Examiner included in the Proposal for Decision.

RESPONSE TO EXCEPTIONS

Exception No. 1. Hearings Examiner abused his discretion by basing the Finding of Fact No. 14 on evidence produced by the Staff Expert (i.e., Department Exhibit No. 1) after the hearing record was closed. Reliance on the post-hearing evidence produced by the Staff Expert violates constitutional due process as well as the Montana Administrative Procedures Act (MCA 2-4-101, et. seq.) and DNRC’s Procedural Rules for Water Right Contested Case Hearings (ARM 36.12.201 et. seq.).

Because of potential concerns with calculations obtained after the close of the record and because this Hearing Examiner finds that this Exhibit is not necessary to the Final Order, Department Exhibit No.1 is stricken.

1 **Exception No. 2. Hearing Examiner Used Department Exhibit No. 1, the Staff Expert**
2 **analysis, which is not supported by substantial evidence. Evidence in the record does not**
3 **demonstrate any correlation in drawdown between Gilkey Farms' well and the Applicants'**
4 **well.**

5 See response to Exception No. 1.

6
7 **Exception No. 3. Hearings Examiner required compliance with Proposed Order Condition**
8 **D, which is vague and ambiguous in that it does not specify the method for measuring**
9 **progressive drawdown nor does it specify the duration of time the Applicant must stop**
10 **pumping if the progressive drawdown exceeds 15 feet per year.**

11 This Hearings Examiner agrees that Condition D is vague and would be problematic to
12 monitor and enforce. Proposed Order Condition D is stricken.

13
14 **Exception No. 4. In Finding of Fact No. 11 the Hearing Examiner did not identify which**
15 **well was shut in and speculated on the amount of drawdown.**

16 Objector Thomson contends that Finding of Fact No. 11 did not identify which well was
17 shut in after the aquifer test. It is clear to this Hearings Examiner that the well that is referred to
18 as "shut in" and returning to pre-test static pressure within 10 days is the Applicant's well.
19 Exhibit A-3 states that the Boyce well was not shut in and the Gilkey well was shut in for two
20 days of the recovery period. Exhibit A-4 page 6 refers to "the well that was shut in" in a
21 description of the aquifer test conducted on the Applicants' well.

22 Objector Thomson argues that Finding of Fact No. 11 speculated on the amount of
23 drawdown. This Hearings Examiner finds the amount of drawdown to be based on competent
24 substantial evidence in the Department file, testimony of Joel Adams, and Exhibit A-4. Objectors
25 presented no qualified witness to dispute the expert testimony provided on behalf of the
26 Applicant. Finding of Fact No. 11 will not be modified.

27
28 **Exception No. 5. Finding of Fact No. 12 does not support that there would be**
29 **approximately 80 years of water for nearby appropriators nor that the Gilkey well has 400**

feet of head above ground level and 800 feet of head below ground level for a total of approximately 1200 feet of available draw down.

This Hearings Examiner finds that the record contains competent substantial evidence to support the figures from Finding of Fact No. 12. Information is found in the testimony of Joel Adams, Exhibit A-4, and in the Department file. Exhibit A-4, Revised Well Test Analysis and Interpretation – Leininger Well, page 8, provides the figures and rationale for Finding of Fact No. 12. With 1200 feet of available drawdown (400 feet above ground and 800 feet below ground level) divided by 15 feet of residual drawdown, nearby appropriators will have 80 years (1200 feet divided by 15 feet) to exercise their prior rights. Objectors presented no qualified witness to dispute the expert testimony provided on behalf of the Applicant. Finding of Fact No. 12 will not be modified.

Exception No. 6. Finding of Fact No. 14:

(A) ignores that the Gilkey well will experience a 61 foot drawdown at the end of the 240 day irrigation season and substitutes “a possible fifteen (15) feet per year rate of progressive draw down if full pressure recovery does not occur”;

Finding of Fact No.14 reports both numbers and does not substitute one for the other or ignore the projected drawdown of 61 feet. As was clear in the testimony and Exhibit A-4 the drawdown at the end of the irrigation season is projected to be 61 feet. There will be recovery over the non-irrigation season and the maximum progressive drawdown at the start of the next irrigation season is projected to be 15 feet per year. This Hearings Examiner finds that the record contains competent substantial evidence to support Finding of Fact No. 14. No modifications will be made as a result of this exception.

(B) does not provide credible support for the finding of no adverse effect based on speculation regarding the Swift aquifer;

Exhibit A-4 provides a technical reference that supports that upward leakage from the Swift aquifer is a major source of recharge to the Kootenai aquifer. Objectors presented no qualified witness to dispute the expert testimony provided on behalf of the Applicant. This Hearings Examiner finds that the record contains competent substantial evidence to support this finding. No modifications will be made as a result of this exception.

1 **(C) does not provide credible support that the magnitude of effects would**
2 **decrease as distance increases;**

3 Exhibit A-4 provides modeling results that show the amount of drawdown and pressure
4 loss will decrease as distance from the Applicants' well increases (Pages 6 & 7). A qualified
5 scientist derived this information using information from the aquifer test using acceptable
6 modeling techniques. Objectors presented no qualified witness to dispute the expert testimony
7 provided on behalf of the Applicant. No modifications will be made as a result of this exception.

8 **(D) incorrectly finds that there is a preponderance of evidence that there is no**
9 **adverse effect on prior appropriators;**

10 See response to Exception No. 7 below. Reference to Department Exhibit No.1 is stricken
11 from Finding of Fact No. 14.

12 **(E) fails to mention evidence in the record of a dramatic decrease in pressure in**
13 **Thomson's well.**

14 Exhibit OG-2 (Levens June 9, 2004 Memorandum) and Exhibit A-4 provide competent
15 substantial evidence that pumping the Applicant's well will not likely affect the Thomson well.
16 Objectors presented no qualified witness to dispute the expert testimony provided on behalf of
17 the Applicant. Objector Thomson presented no expert testimony regarding the drop in pressure
18 of his well or its recovery. No modifications will be made as a result of this exception.

19
20 **Exception No. 7. Finding of Fact No. 16:**

21 **(A) is incorrect in that it seems to say prior appropriators should bear any**
22 **expense they incur caused by the applicants use of water;**

23 Priority of appropriation does not include the right to prevent changes by later
24 appropriators in the condition of water occurrence, such as artesian pressure. Mont.Code Ann.
25 85-2-401. In applying Mont. Code Ann. § 85-2-401(1), the Department has consistently found
26 that although objectors dependent on artesian flow may be affected by a proposed appropriation,
27 artesian flow is "not a protectable means of diversion." *In re Application No. 76L 72498 by*
28 *Cross*, Proposal for Decision, pp. 9-10, adopted in the Final Order, May 21, 1991; see also, *In re*
29 *Application 76L 75997 by Carr*, Proposal for Decision, pp. 11-13, adopted in the Final Order,
30 July 31, 1991. These orders state:

1 “To hold that an appropriator is entitled to maintain artesian pressure against any
2 subsequent appropriators would be to allow a single appropriator or limited
3 number of appropriators to control an entire aquifer simply to make their means
4 of diversion easier.

5 The principle that no appropriator should be allowed to “command the source”
6 simply so that he may have a convenient method of diversion, is consistent with
7 the State of Montana’s policy maximizing the beneficial use of water. See § 85-
8 2-101(3), MCA”

9
10 **(B) the finding of “approximately eighty (80) years of water for nearby**
11 **appropriators to exercise their prior rights” are speculative and not supported by the**
12 **record.**

13 This calculation is based on competent substantial evidence in the record and arrived at using
14 accepted practices. See response to Exception No. 5. Objectors presented no qualified witness to
15 dispute the expert testimony provided on behalf of the Applicant. No modifications will be made
16 as a result of this exception.

17
18 **Exception No. 8. Conclusion of Law No. 5 that water is legally available is not supported by**
19 **sufficient credible evidence.**

20 There is competent substantial evidence in the record to show legal availability. Objectors
21 presented no qualified witness to dispute the expert testimony provided on behalf of the
22 Applicant. Conclusion of Law No. 5 relies on Finding of Fact No. 12. Response to Exception
23 No. 5 confirms that Finding of Fact No. 12 is based on substantial credible information. No
24 modifications will be made as a result of this exception.

25
26 **Exception No. 9. Conclusion of Law No. 6 that granting the permit with conditions will not**
27 **adversely affect water rights of prior appropriators is not supported by sufficient credible**
28 **evidence; the conclusion that “Objectors will have water available for their use without a**
29 **pump for years to come” is not supported by the record.**

1 Conclusion of Law No. 6 is supported by Findings of Fact Nos. 13, 14, 15, & 16. Exceptions
2 were filed on FOF No. 14 & 16. See response to Exception No. 6 & Exception No. 7. The
3 record supports this conclusion. Objectors presented no qualified witness to dispute the expert
4 testimony provided on behalf of the Applicant. Objectors can make a call on the water when
5 they cannot reasonably exercise their water rights. Making a call is not an adverse effect. *E.g., In*
6 *the Matter of the Application for Beneficial Water Use Permit No. 41H-104667 and Application*
7 *to Change Appropriation Water Right No. 41H-G(W) 125497 by Ronald J. Woods*, Proposal for
8 Decision (April 2000), adopted by Final Order (June 2000); *In the Matter of Temporary*
9 *Beneficial Water Use Permits 42C-103576, 42C-103601; and 43C-104945 by Empire Sand and*
10 *Gravel*, Proposal for Decision (March 1999), adopted in Final Order (April 1999).

11 Findings of Fact No. 13 & 14 reference a cyclic pumping plan as a means of reducing drawdown
12 on other appropriators' water rights. This pumping plan is described in Proposed Order
13 Condition A. This Hearings Examiner has modified Condition A to require reporting of periods
14 of irrigation use.

15
16 **Exception No. 10. The permit should allow no irrigation; should require the Applicant to**
17 **provide Objectors with records sent to Lewistown Water Resources Regional Office; allow**
18 **monitoring by the Objectors; should require monitoring by DNRC and the Objectors;**
19 **should require inspection and approval by the DNRC and the Objectors.**

20 The Applicant has met the criteria and Mont. Code Ann. § 85-2-311 requires that a permit be
21 issued. Records submitted to Lewistown Regional Office are public information and available
22 for inspection and copying during normal business hours. The Department has authority to
23 inspect the water use as necessary for compliance with the Montana Water Use Act and does not
24 have authority to grant Objectors access to Applicants' property.

25
26 **Exception No. 11. Applicants' exception requests that Condition D be modified to require**
27 **adjustments to use only after five years with average drawdown exceeding 15 feet or 6.5 psi**
28 **and make the threshold condition applicable only to effects of pumping by the Permittee.**

29 This Hearings Examiner has stricken Proposed Order Condition D as previously
30 explained.

1
2 **ORDER**

3 Finding of Fact No. 14 contained in the Proposal For Decision is hereby modified to read as set
4 forth below. Conclusion of Law No. 6 is hereby modified to read as set forth below.

5 **Finding of Fact No. 14.** The three wells (Gilkey, Boyce, Thomson) nearest to
6 Applicant's are completed at depths similar to the Applicant's well. The potential effects
7 on the nearest well completed in the formation, the Gilkey well, include a 61 foot
8 drawdown (26.4 pounds per square inch [psi] reduction in pressure) at the end of the 240
9 day irrigation season, and a possible 15 feet per year rate of progressive drawdown if full
10 pressure recovery does not occur. The rate and amount of any progressive drawdown will
11 depend upon the length of the recovery period each year, the effects of any aquifer
12 boundary conditions encountered, and whether the Kootenai aquifer reaches a new state
13 of equilibrium between discharge from and recharge to the aquifer. An increase in
14 recharge could come from the Swift aquifer, located beneath the Kootenai
15 aquifer. The Swift aquifer currently provides some vertical recharge to the Kootenai
16 aquifer. The Gilkey well has 400 feet of pressure head above ground level and 800 feet
17 of below ground level head, or a total of approximately 1200 feet of available drawdown.
18 If progressive drawdown continues at the rate of 15 feet per year, there would be
19 approximately 26 years¹ of available drawdown before the Gilkey well no longer flows at
20 the surface and pumps may have to be installed. Wells further away from Applicant's
21 well may be affected by the proposed use, but the magnitude of the effects would be less
22 than those in the closest Gilkey well. Applicant's cyclic pumping plan to minimize
23 aquifer effects along with the control valve on the wellhead, demonstrates that the
24 proposed use can be controlled so water is available to satisfy the water rights of prior
25 appropriators. (Department file and testimony of Joel Adams)

26
27 **Conclusion of Law No. 6.** The Applicant has proven that the water rights of prior
28 appropriators under existing water rights, certificates, permits, or state reservations will
29 not be adversely affected when conditioned according to Applicant's plan which limits
30 irrigation water use to 30 days followed by a 15-day recharge period. The Applicant will

¹ 400' above ground level divided by 15' per yr ≈ 26.6 yrs

1 be required to report periods of irrigation use. The purpose of this reporting requirement
2 is to document that the Applicant is following the cyclical pumping plan.

3 All Parties submitted post-hearing briefs on whether pump installation by the
4 Objectors, if required to exercise their water right because of reduced pressure in the
5 aquifer, is reasonable or if pump installation would be an adverse affect. The briefs cited
6 Department hearing orders and non-Montana case law. The Applicant argued that a
7 reduction in artesian pressure does not constitute an adverse effect on Objectors because
8 Mont. Code Ann. §85-2-401 allows a junior appropriator to affect water pressures.
9 Thomson argues that §85-2-401 applies only to change authorizations requested under
10 §85-2-402, and that the expense Thomson will incur if his artesian well pressure is
11 reduced to such an extent that he must install a pump to continue to exercise his water
12 right is an adverse effect on his water right. Gilkey argues there is a balancing test which
13 compares the value of the water appropriated by the junior to the costs to the senior, and
14 that junior appropriators must pay for improvements needed to senior appropriators'
15 diversions to allow them to continue to exercise their water right citing out of state cases.
16 The Hearing Examiner found no Montana Supreme Court case on point. Here, the record
17 shows that senior appropriators will have water available for their use, albeit likely at a
18 reduced pressure, and which may need to be pumped for their rights to be exercised.
19 Department hearing order precedent is that artesian pressure is not protectable and a
20 reduction by a junior appropriator is not considered an adverse effect. *See In re*
21 *Application No. 72948-G76L by Cross*, Final Order (1991); *In re Application No. 75997-*
22 *G76L by Carr*, Final Order (1991). Mont. Code Ann. §85-2-311(1)(b). Here, the
23 Objectors will have water available for their use without a pump for years to come, but
24 likely at a reduced pressure. If and when they can no longer exercise their water rights
25 without a pump, senior appropriators may seek a determination that they cannot
26 reasonably exercise their water rights from a district court. See Finding of Fact Nos. 13,
27 14, 15, and 16.

28
29 Application for Beneficial Water Use Permit No. 76H-30005803 is hereby **ISSUED** with
30 all terms and conditions of the Proposed Order with exception of Condition A, which is modified

1 to add reporting requirement as noted below and Condition D, which is stricken. Department
2 Exhibit No. 1 is stricken.

3 A. The irrigation use is limited to 30 days of irrigation followed by 15 days of non-use
4 within each 45 day irrigation cycle during the period of use. The appropriator shall keep
5 written records of periods of irrigation use. The appropriator shall submit the records by
6 November 30 of each year and upon request at other times during the year. Failure to
7 submit reports may be cause for revocation of a permit or change. The records must be
8 sent to the Lewistown Water Resources Regional Office.

9
10 **NOTICE**

11 This final order may be appealed by a party in accordance with the Montana
12 Administrative Procedures Act (title 2, chapter 4, Mont. Code Ann.) by filing a petition with the
13 appropriate District Court within 30 days after service of this order. If a petition for judicial
14 review is filed and a party to the proceeding elects to have a written transcript prepared as part of
15 the record of the administrative hearing for certification to the reviewing District Court, the
16 requesting party must make arrangements for the preparation of the written transcript with a
17 transcriber. If that party makes no arrangements, the Department will simply transmit a copy of
18 the audio recording of the oral proceedings directly to the District Court.

19
20
21 Dated this 19th day of October 2006.

22
23
24
25 /Original signed by William J. Schultz by e-signature/
26 William J. Schultz
27 Hearing Examiner
28 Department of Natural Resources and Conservation
29 Water Resources Division
30 P.O. Box 5004
31 Missoula, Montana 59806
32
33
34
35
36

1 **CERTIFICATE OF SERVICE**
2

3 This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties
4 listed below on this 19th day of October 2006 by first class United States mail.

5
6 JOHN E BLOOMQUIST
7 DAVID R STEWART
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23 **CC:**
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35
36 /Original signed by Jamie Price/

37 Jamie Price
38 Hearings Unit, 406-444-6615
39